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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Petition of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 99-362
Table of Allotments)	RM-9730
FM Broadcast Stations)	
(Canton and Morristown, New York))	

**COMMENTS OF CARTIER COMMUNICATIONS INC.
AND WATERS COMMUNICATIONS INC.**

Cartier Communications Inc. ("Cartier") and Waters Communications Inc. ("Waters") (collectively, the "Petitioners"), pursuant to Section 1.420 of the Commission's Rules and by their attorneys, hereby file their Comments in this proceeding. For the reasons discussed below, the Commission should adopt the proposed channel substitutions and modify Section 73.202(b) of its rules accordingly.¹ In the alternative, the Petitioners request the substitution of Channel 244C3 for Channel 244A at Canton, New York and the modification of license of WVNC(FM) accordingly.

The *Notice of Proposed Rule Making* ("NPRM")² proposes the following channel substitutions: (1) substitution of Channel 275C3 for Channel 244A at Canton, New York and modification of license of WVNC(FM) accordingly; and (2) substitution of Channel 244C3 for Channel 275A at Morristown, New York and modification of license for WNCQ(FM) accordingly. The Commission adopted the *NPRM* in response to a petition for rule making filed by Petitioners.

¹ The *Notice of Proposed Rule Making* authorizes the filing of comments by February 7, 2000. Thus, these Comments are timely filed.

² DA 99-2843 (Chief, Allocations Branch) (rel. Dec. 17, 1999).

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The proposed channel substitutions serve the public interest by permitting two stations to provide improved service to the public. The substitution of Channel 275C3 for Channel 244A at Canton, New York and modification of WNVC(FM) accordingly will permit WVNC(FM) to provide wide area service to the public. Similarly, the substitution of Channel 244C3 for Channel 275A at Morristown, New York and modification of WNCQ(FM) accordingly will permit WNCQ(FM) to provide wide area service to the public.

Cartier hereby states that upon adoption of a Report and Order modifying the FM Table of Allotments to permit WVNC(FM) to operate on Channel 275C3, Cartier will file an application for construction permit for the new facilities promptly. Waters hereby states that upon adoption of a Report and Order modifying the FM Table of Allotments to permit WNCQ(FM) to operate on Channel 244C3, Waters will file an application for construction permit for the new facilities promptly. Cartier and Waters further state that upon grant of construction permits for the new facilities for WVNC(FM) and WNCQ(FM), Cartier and Waters will construct the facilities and commence operation promptly of each station.

The Commission requests further comment on whether the proposed channel substitutions qualify as an “incompatible channel swap” and therefore exempt from competing expressions of interest pursuant to Section 1.420(g)(3) or if the proposed channel substitutions are non-adjacent channel upgrades pursuant to Section 1.420(g)(1). *NPRM* at ¶4. The proposed channel substitutions qualify as an incompatible channel swap because when the Commission considers the totality of the circumstances, there are no other channels of the requested class available for allotment at each of the communities except the ones proposed to

be exchanged between the two communities.

In *Modification of FM Broadcast Licenses to Higher Class Co-Channel or Adjacent Channel*, 60 RR 2d 114 (1980), the Commission permitted broadcasters to upgrade their facilities on adjacent or co-channels that were mutually exclusive with their presently licensed facilities without placing their broadcast licenses at risk to competing expressions of interest. The Commission reasoned that because the proposed upgrades were mutually exclusive to the present operation of the licensed facilities, no party other than the licensee could apply for and operate the modified facilities once the Commission amended the FM Table of Allotments. The Commission adopted a similar rationale for incompatible channel swaps, which the Commission defined as follows:

The Commission proposes the following hypothetical as qualifying as an incompatible channel swap where a licensee on Channel 240A at community A seeks to upgrade on Channel 271C2. To do so, the licensee on Channel 240A must exchange channels with the licensee on Channel 270A in community B. The allotment of Channel 271C2 to community A must require the deletion of channel 270A at community B and channel 240A must be the only class A which can be substituted at community B. Although channels 240A and 271C2 are not adjacent, nevertheless Channel 271C2 is not available by other interested parties, because Channel 270A must be replaced with Channel 240A in order for the upgrade to be possible.

See *Modification of FM Broadcast Stations* at 120. The elements of an incompatible channel swap therefore are that: (1) the proposed channel substitutions are mutually exclusive; (2) the swap requires the licensee in one of the communities to relinquish its channel to the licensee in the other community; and (3) the proposed channel substitutions are the only channels available for each community, *i.e.*, the proposed channel substitutions are unique.

The *NPRM* satisfies the test established in *Modification of FM Broadcast Stations*. The

Commission agrees that the proposed exchange of channels between Morristown and Canton are mutually elusive. The Commission further agrees that Channel 244C3 is the only channel that can be allocated to Morristown. However, the Commission is uncertain whether Channel 275C3 is the only channel that can be allocated to Canton because Channel 244C3 also satisfies the spacing requirements for Canton, but only if the Commission does not consider the proposal allocating Channel 244C3 to Morristown. As demonstrated below, Channel 275C3 is the only the channel that may be allocated to Canton consistent with the purpose of the incompatible channel swap.

The Commission's hypothetical in *Modification of FM Broadcast Stations* demonstrates that in considering what channels are available for each community, the Commission will not consider the present channel allocated to that community that is to be relinquished as part of the incompatible channel swap. This approach is logical because the present channel allocated to the community must be relinquished to the second community seeking the non-adjacent upgrade. If the Commission were to consider the relinquished channel as being available for allotment to the community, then there would always be more than one channel available and an incompatible channel swap would be impossible. Clearly this was not the Commission's intention in adopting the incompatible channel swap.

Commission precedent supports the interpretation that the Commission should not consider the present channel allocated to the community as available for allotment purposes if the channel is being relinquished to the second community. In *Beverly Hills, Florida*,³ the

³ 8 FCC Rcd 2197 (Chief, Allocations Branch 1993).

Commission granted an incompatible channel swap for two communities even though it was possible to upgrade the stations licensed to both communities on their presently allocated channels. In *Beverly Hills*, the Commission issued a Notice of Proposed Rule Making to upgrade WXOF(FM), Beverly Hills, Florida, from its present Channel 246A to Channel 246C3. A timely filed counterproposal in that proceeding proposed an incompatible channel swap between Beverly Hills, Florida and Holiday, Florida, whereby both stations would swap their existing Class A Channels in return for upgrade on their new channels.⁴ The Commission granted the incompatible channel swap despite opposition from the original petitioner against the incompatible channel swap and in support of an upgrade of its station on its present channel. Thus, despite the ability to upgrade WXOF(FM) and WLVU(FM) on their present channels, the Commission still granted the incompatible channel swap. The Commission has reaffirmed the incompatible channel swap on appeal.⁵

The Commission's reliance upon *Colonial Heights, Tennessee*⁶ is misplaced. In *Colonial Heights*, the Commission declined to grant a request for an incompatible channel swap because the Commission could allocate not only the requested channel but additional channels to one of the proposed communities. The rule making proposal in *Colonial Heights* was also deficient because it involved a daisy chain of channel substitutions among four communities and not the normal frequency change between two communities. Similarly, in

⁴ Specifically, the counterproposal proposed the substitution of Channel 292C3 for Channel 246A at Beverly Hills and modifying WXOF(FM) accordingly, and the substitution of Channel 246C2 for Channel 292A at Holiday Florida, and modifying WLVU(FM) accordingly.

⁵ *Beverly Hills*, Florida, 8 FCC Rcd 8515 (Chief, Policy and Rules Division 1993), *aff'd.*, 11 FCC Rcd 4641 (Chief, Policy and Rules Division 1996).

Ashton, Idaho,⁷ the Commission denied an incompatible channel swap because the Commission could allocate additional channels to both of the proposed communities in addition to the proposed channels. In neither case did the Commission reject the incompatible channel swap because it was possible to use the presently allocated channel to the community. Instead, it was the availability of additional channels that defeated the incompatible channel swap.

That the petition satisfies the Commission's requirements for an incompatible channel swap is further evidenced that if the Commission declines to adopt the proposal contained in its *NPRM*, the petitioners could achieve the incompatible swap in a two-step process. Cartier could file an application for a one-step upgrade to operate WVNC(FM) on Channel 244C3. Or the Petitioners could request that if the Commission declines to adopt the proposal contained in the *NPRM*, the Commission amend the FM Table of Allotments and upgrade WVNC(FM) on Channel 244C3.⁸ In either scenario, the Commission would amend the FM Table of Allotments and allocate Channel 244C3 to Canton.

The Petitioners would then file a new petition for rule making. The new petition would request the same channel substitutions as in the *NPRM*, but WVNC(FM) already would be authorized to operate on Channel 244C3. In that scenario, the analysis would satisfy the Commission's incompatible channel swap adopted in *Modification of FM Broadcast Stations*. A comparison of the petition with Commission's hypothetical in *Modification of FM Broadcast*

⁶ 11 FCC Rcd 18079 (Chief, Policy and Rules Division) (1996).

⁷ DA 98-1644 (Chief, Allocations Branch) (rel. Aug. 21, 1998).

⁸ In the event the Commission declines to adopt the proposal contained in its *NPRM*, the Petitioners hereby request that the Commission substitute Channel 244C3 for Channel 244A at Canton, amend the FM Table of Allotments, and modify the facilities of WVNC(FM) accordingly.

Stations supports this conclusion. By substituting the actual names and channels in the future petition for rule making with the hypothetical, we achieve the following:

The Commission proposes the following hypothetical as qualifying as an incompatible channel swap where WNCQ(FM) operating on Channel 275A at Morristown seeks to upgrade on Channel 244C3. To do so, WNCQ(FM) on Channel 275A must exchange channels with WVNC(FM) on Channel 244C3 in Canton. The allotment of Channel 244C3 to Morristown must require the deletion of Channel 244C3 at Canton and Channel 275C3 must be the only Class C3 which can be substituted at Canton. Although channels 275A and 244C3 are not adjacent, nevertheless 244C3 is not available by other interested parties, because Channel 244C3 must be replaced with Channel 275C3 in order for the upgrade to be possible.

The Petitioners can accomplish the incompatible channel swap with such a two-step process with no additional changes than those proposed in the instant *NPRM*. This method, however, would require additional time for the Commission to process the new rule making petition and consume scarce resources of the Commission. Instead, granting the incompatible channel swap as proposed in the *NPRM* instead of such a bifurcated proceeding better serves the public interest by permitting Petitioners to provide improved service sooner while conserving scarce Commission resources.

CONCLUSION

The *NPRM* proposes channel substitutions for Canton and Morristown, New York and modification of facilities for WNVC(FM) and WNCQ(FM) that satisfies the standard for an incompatible channel swap. Channel 244C3 is unavailable for Canton because it has been allocated to Morristown. Moreover, Commission precedent and rationale in adopting the incompatible channel swap mandates that the Commission not consider the present channel

allocated to Canton in determining whether other channels are available for that community. The Commission does not dispute that the *NPRM* otherwise satisfies the incompatible channel swap.

WHEREFORE, for the foregoing reasons, Cartier Communications Inc. and Waters Communications Inc. respectfully request that the Commission issue a Report and Order granting the proposed channel substitutions for Canton and Morristown as proposed in the *NPRM*. In the alternative, Petitioners request the substitution of Channel 244C3 for Channel 244A at Canton, New York and the modification of WVNC(FM) accordingly.

Respectfully submitted

**CARTIER COMMUNICATIONS INC.
WATERS COMMUNICATIONS INC.**


David G. O'Neil, Esq.

Rini, Coran & Lancellotta, P.C.
1350 Connecticut Avenue, N.W.
Suite 900
Washington, DC 20036
(202) 296-2007

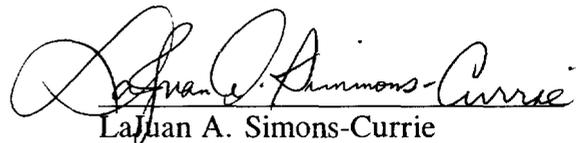
February 7, 2000

Their Attorney

Certificate of Service

I, Lajuan A. Simmons-Currie, a secretary with the law firm of Rini, Coran & Lancellotta, do hereby certify that I have caused a copy of the foregoing "Comments and of Cartier Communications Inc. and Waters Communications Inc." to be mailed, first-class, postage prepaid this 7th day of February 2000:

*Ms Leslie K. Shapiro
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554


Lajuan A. Simons-Currie

*Via Hand Delivery